



Employment Law Note

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What Justice Anthony Kennedy's Retirement from the U.S. Supreme Court May Mean for Future Labor and Employment Cases



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Just hours after the ink had dried on the United States Supreme Court's ruling in *Janus v. AFCME Council 31*—in which the Court held that public employees cannot be required to pay “fair share” union fees—Justice Anthony Kennedy announced his retirement. Justice Kennedy—long hailed the “swing vote” on the Court—has nonetheless been generally reliably “pro-employer” in employment-related cases before the Court.

In this most recent 2017-2018 term alone, in addition to the *Janus* opinion (described in greater detail below), Justice Kennedy voted with the Court's conservative block on *Epic Systems Corp. v. Lewis* (ruling that employees may be required to enter into arbitration agreements that waive their rights to pursue class-action or collective action claims); both cases were 5-4 decisions along ideological lines. Justice Kennedy also sided with the conservative justices on *Wal-Mart Stores, Inc. v. Dukes* in 2011, a decision that narrowed the definition of the commonality requirement of class actions. He joined the conservative bloc again in *NLRB v. Noel Canning* in 2014, holding that President Barack Obama's three recess appointments to the National Labor Relations Board were unconstitutional due to the short length of the recess in question.

Janus v. AFCME Council 31

In a 5-4 decision on the final day of the Court's 2017-2018 term, the Court ruled that the First Amendment prohibits public sector entities from compelling the

collection of fees from non-union members, even if the employees benefit from the collective bargaining agreement negotiated by the unions. The June 27, 2018 decision—while limited to public sector labor organizations across the country—will have a broader impact. By severely weakening the ability of public sector union funds, it could also signal a weakening of both public and private sector unions through union-sponsored litigation at state and local levels.

Looking Ahead: Anticipated Post-Kennedy Court Decisions

Prior to Justice Kennedy's retirement announcement, the Court agreed to hear four cases in the 2018-2019 term raising labor and employment law issues—two involving arbitration issues and two implicating federal age bias and railroad tax laws, as follows:

- ***Lamps Plus Inc. v. Varela*** (whether an employment contract silent on the issue of class arbitration can be construed in the favor of workers seeking proceedings)
- ***New Prime Inc. v. Oliveira*** (whether interstate truck drivers must arbitrate federal wage and hour claims)
- ***Mt. Lemmon Fire District v. Guido*** (whether state political subdivisions with fewer than 20 employees must adhere to employee discrimination protections under the federal Age Discrimination in Employment Act)

- ***BNSF Railway Co. v. Loos*** (whether a railroad's payments to employees for lost work time is taxable under the Railroad Retirement Act)

On July 9, 2018, Judge Brett Kavanaugh—who currently sits on the United States Court of Appeals for the District of Columbia Circuit—was nominated to succeed Justice Kennedy. The outcomes of the cases could depend on how quickly Justice Kennedy's successor—Judge Kavanaugh or otherwise—is confirmed by the Senate. If the cases are heard before that time with only eight justices on the bench, any 4-4 splits would mean that the appeals courts' rulings below stand.

Key Takeaway for Employers

Although fairly reliably “pro-employer” in his jurisprudence, Justice Kennedy's reputation as the Court's “swing vote” has placed him in the political crossfire. Both Republicans and Democrats alike have been anxiously watching and waiting for any announcement of his retirement as the political party with the opportunity to nominate his predecessor has the chance to reshape the Court in a manner not seen in decades. With Justice Kennedy's June 27, 2018 announcement of his imminent retirement, it appears that Republicans now have that chance. If a new justice is nominated and confirmed in the model of the two most recent Republican-nominated justices—namely, Justices Samuel Gorsuch and Samuel Alito—

employers can very likely safely presume that any future case considered and decided by the Court for years to come will favor employers in outcome. Judge Kavanaugh's July 9, 2018 nomination fits that bill. With a history of consistently siding with business in employment, labor, and benefits cases, if confirmed, Judge Kavanaugh would replace Justice Kennedy as a reliably pro-employer voice on the Court.

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